

SERVED: February 6, 2003

NTSB Order No. EA-5017

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 3rd day of February, 2003

_____	)	
MARION C. BLAKEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-16344
v.	)	
	)	
CLINTON K. SHILLINGFORD,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from the January 16, 2002 written initial decision of Administrative Law Judge William A. Pope, II, issued following an evidentiary hearing held on November 9, 2001.<sup>1</sup> By that decision, the law judge found that respondent operated an unairworthy aircraft in commercial operation and in a manner inconsistent with the air carrier's operating certificate. He affirmed the Administrator's determination that respondent

---

<sup>1</sup> The initial decision is attached.

violated sections 91.7(a), 91.13(a), 119.5(l), 135.3(a)(1), and 135.65(b) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Parts 91, 119, and 135 (1999)), and upheld a 180-day suspension.<sup>2</sup> As discussed below, we deny the appeal, in substantial part.

Before any discussion on the merits, we note that the Administrator also originally alleged a violation of FAR section 135.73, but withdrew that charge at the hearing and changed the

---

<sup>2</sup> The pertinent FAR sections state, as follows:

**§ 91.7 Civil aircraft airworthiness.**

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

**§ 119.5 Certifications, authorizations, and prohibitions.**

\* \* \* \*

(1) No person may operate an aircraft under this part, part 121 of this chapter, or part 135 of this chapter in violation of an air carrier operating certificate, operating certificate, or appropriate operations specifications issued under this part.

**§ 135.3 Rules applicable to operations subject to this part.**

(a) Each person operating an aircraft in operations under this part shall—

\* \* \* \*

(1) While operating inside the United States, comply with the applicable rules of this chapter...

**§ 135.65 Reporting mechanical irregularities.**

\* \* \* \*

(b) The pilot in command shall enter or have entered in the aircraft maintenance log each mechanical irregularity that comes to the pilot's attention during flight time. Before each flight, the pilot in command shall, if the pilot does not already know, determine the status of each irregularity entered in the maintenance log at the end of the preceding flight.

sanction sought from 180 to 160 days. In the initial decision, the law judge mistakenly affirmed the 180-day suspension. Therefore, on this issue, we grant respondent's appeal to correct the sanction to a suspension of 160 days.<sup>3</sup>

The Administrator's allegations arose from a flight conducted on July 28, 1999, where respondent operated, for Clint Aero, Inc., a Cessna Caravan II on a flight from Dominica to St. Thomas, U.S. Virgin Islands.<sup>4</sup> As respondent admits, there were 13 passengers on the flight. The operating specifications for Clint Aero provided for carriage of nine passengers or less in Part 135 operations. Respondent asserted, however, that the flight at issue was a non-revenue charity flight and, as such, conducted under Part 91, not 135. The Administrator also charged that a seat on the aircraft was improperly installed, and the maintenance records documenting that seat, although required, did not exist.

At the hearing, Aviation Safety Inspector Fernando Otero testified that he saw the aircraft land in St. Thomas and witnessed 14 people exit, including seven to 10 children.<sup>5</sup> He stated his intent to conduct a ramp inspection, and respondent

---

<sup>3</sup> Respondent filed a brief on appeal; the Administrator filed a reply, in which she does not oppose this sanction correction.

<sup>4</sup> Respondent is President, Director of Operations, and Chief Pilot for Clint Aero, Inc.

<sup>5</sup> None of the children appeared to him to be less than seven years old. Transcript (Tr.) at 36. Under the FAR, he explained, only children age two and under may sit on a passenger's lap during flight. Tr. at 34.

told him that the flight was a charity flight for the children of Tortolla. The inspector subsequently looked inside the aircraft and counted 14 seats, including those of the pilot and copilot. Tr. at 33, 40. The last left aisle seat, however, was flimsily fastened with some type of adapter to fit the tracks on the aircraft.<sup>6</sup> Tr. at 32, 173. Inspector Otero further stated his opinion that the adaptation of the seat in this manner was an unapproved repair and rendered the aircraft unairworthy. Tr. at 173-74. When he touched and shook the seat, it came off of its attaching point. Tr. at 44.

David Talbert testified that 1) he and his two grandchildren (both under the age of seven) were passengers on the subject flight from Dominica to St. Thomas; 2) all three had their own seats; 3) he had purchased three tickets for their passage on the flight; and 4) all seats on the plane were full. Tr. at 119-20, 127-28, 140; Ex. A-16.

Respondent stipulated that the seat at issue was not attached to the aircraft and that it would have been improper for someone to use it as a seat during the flight. Tr. at 20. He claimed, however, that he had merely transported the seat as cargo, and that no one sat in it during the flight.<sup>7</sup> Tr. at 255-

---

<sup>6</sup> When the inspector saw the seat, he surmised it "didn't appear to conform to the specifications and regulations." Tr. at 32.

<sup>7</sup> Respondent stated that he personally told the passengers where to sit. Tr. at 255. Both he and his wife testified that the last seat bore a sign stating, in effect, "do not sit here." Tr. at 221 and 255. Mrs. Schillingford stated that she met the aircraft as soon as it landed to help the passengers deplane and, at that time, removed the sign from the seat. Tr. at 219-221.

56. He claimed that there were eight adults (including him) and six children on the aircraft, only 11 seats on the aircraft (other than the one transported as cargo), one vacant passenger seat, and that four children sat on adults' laps during the flight. Tr. at 253-55. He further asserted that Mr. Talbert's tickets were never taken, and the flight was conducted for charity under Part 91, not Part 135. Therefore, he was not constrained by the limitation of carrying only nine or fewer passengers, as set forth in Clint Aero's operations specifications.

The law judge found that Mr. Talbert and his grandchildren were paying passengers, transported by Clint Aero for compensation, and their ticket prices were never refunded. He found Inspector Otero "completely credible" in his description of the nonconforming seat and statement on the number of passengers. The law judge also determined that the seat at issue was both jury-rigged and utilized during the flight. Finally, he credited neither respondent's claim that the seat was transported as cargo nor his and Mrs. Shillingford's assertion that the seat was placarded.

On appeal, respondent contends that the law judge erred in labeling this flight as commercial and subject to Part 135, since he found that no one took Mr. Talbert's tickets before, during, or after the flight. He further contends that the emphasis placed by the law judge on the finding that Clint Aero did not issue a refund to Mr. Talbert was unjustified. The tickets, he

argues, were available to be used again by Mr. Talbert on another flight, rendering a refund unnecessary. In addition, he contends, he relied on his gate employee to ensure that all who boarded were non-revenue passengers and a refund would have been improper once he learned of the certificate action.

Respondent's arguments are unpersuasive. Mr. Talbert bought tickets, showed them at the Clint Aero counter, and was permitted access to the aircraft. These facts indicate he was led to believe that he and his family were flying on a commercial flight. As a paying passenger, he deserved the more stringent protections that Part 135 service provides.<sup>8</sup> Regarding respondent's claim of his reliance on the gate employee to be sure that none of the passengers paid for travel, the law judge's decision on this issue is a credibility determination. Our case law is well-settled that a credibility determination of the law judge will not be overturned absent a showing that it is arbitrary, capricious, or not in accordance with law.

Administrator v. Smith, 5 NTSB 1560, 1563 (1987). Respondent makes no such showing. The preponderant evidence supports a conclusion that paying passengers were on board the flight. Given this determination, the law judge correctly found that the flight was subject to the strictures of FAR Part 135 and was operated in contravention of Clint Aero's operations specifications.

---

<sup>8</sup> Cf., Administrator v. Wagner, NTSB Order No. EA-4081 at 6-7 (1994), aff'd, 86 F.3d 928 (1996) (Any forfeiture of Part 135 protection must be made knowingly).

On the issue of the improperly installed seat, respondent argues the evidence does not support the law judge's conclusion that the seat was not transported as cargo, but was meant for use. Again, his argument is unconvincing. The law judge's findings were based, in large part, on a credibility determination in favor of Inspector Otero and Mr. Talbert. Respondent offers no persuasive reason to alter those findings. Through the inspector's testimony and photographs, the Administrator presented sufficient evidence that the seat had been linked to the track in the aircraft in a makeshift manner. In addition, according to Mr. Talbert, all seats on the aircraft were occupied during the flight. This allows, and supports, the inference that someone sat in the makeshift seat. The law judge, being the person in the best position to observe the witnesses as they testified, weighed the conflicting accounts and came to a conclusion.<sup>9</sup> We see no reason to disturb that decision.

Finally, respondent argues that the evidence is insufficient to prove that respondent failed to make an entry into the aircraft's maintenance log regarding the seat. He claims the inspector never asked to see the maintenance log and, consequently, the Administrator cannot meet her burden of proof without entering the log into evidence. This argument fails on its face. The evidence supports a finding that respondent did

---

<sup>9</sup> He specifically did not credit the testimony of respondent and respondent's wife on the issue of whether a sign had been placed on the seat, and found respondent's claim that the seat was cargo one that "strains credulity." Initial Decision at 6.

not make such an entry into the logbook. After all, he testified and argued that the seat was cargo and not meant to be utilized for sitting on the aircraft. He steadfastly maintained that this was not a seat installation or a mechanical irregularity. He stipulated at hearing that the seat was not attached to the aircraft and that it would have been improper for someone to sit on it. Tr. at 20. An insinuation now that he *may* have made an entry about the seat in his maintenance logbook is, at best, implausible.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is granted, in part, changing the time of suspension from 180 to 160 days, and otherwise denied;
2. The initial decision is affirmed in all other respects; and
3. The 160-day suspension of respondent's airline transport pilot certificate shall begin 30 days after the service date indicated on this opinion and order.<sup>10</sup>

HAMMERSCHMIDT, Acting Chairman, and GOGLIA, BLACK, and CARMODY, Members of the Board, concurred in the above opinion and order.

---

<sup>10</sup> For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).